No. 00-1595

DEC 10 2001

IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ARIZONA, CALIFORNIA, HAWAII, MASSACHUSETTS AND WEST VIRGINIA AND COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The States of New York, Arizona, California, Hawaii, Massachusetts and West Virginia and the Commonwealth of Puerto Rico, through their attorneys general, respectfully submit this amicus curiae brief. Amici include high-immigration states that are believed to have most of the United States' undocumented population.[1] These states have a strong interest in the vigorous enforcement of federal labor law, as applied to both lawful and undocumented workers.

Federal labor law, as well as other federal statutes regulating workplace conditions, operates alongside state laws to ensure adequate protection of employees in the workplace. If the federal government is prohibited from awarding back pay remedies to undocumented workers, employers who hire such workers will be able to violate the National Labor Relations Act with impunity — a result that will have particularly unfortunate consequences in industries with a significant proportion of undocumented employees.

The amici states also have a vital interest in enforcing their own employment and other laws, which have always been recognized as within the states' police powers. Remedies available under such state laws typically include back pay for employees who have been fired illegally. Especially since this Court decided *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA"), courts have weighed both immigration law

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1. The Immigration and Naturalization Service ("INS") estimates that as of October 1996, there were five million illegal residents in the United States. The eight states that the INS believes had the largest undocumented populations were California (2 million), Texas (700,000), New York (540,000), Florida (350,000), Illinois (290,000), New Jersey (135,000), Arizona (115,000) and Massachusetts (85,000). "INS Releases Updated Estimates of U.S. Illegal Population," http://www.ins.gov/graphics/publicaffairs/newsrels/illegal.htm.

and state statutes and often concluded that state law requires the availability of back pay or other damages — even for periods when an alien was not legally authorized to work.

Although the sole question in this case involves the discretion of the federal National Labor Relations Board ("NLRB" or "Board") to provide back pay under federal law, petitioner wrongly implies that *Sure-Tan* or IRCA bars *all* back pay awards to undocumented aliens.[2] Should petitioner prevail on the central issue in this case, harmful consequences for state law enforcement could result. Courts could conclude that a ruling by this Court foreclosing NLRB awards to undocumented workers based on the balance of public policies under federal law extends to the states as well. Such an outcome would severely jeopardize the ability of states to enforce minimum wage, safety, equal employment and other state laws against the many employers whose workers are undocumented. It would give such firms a competitive edge against employers that are more scrupulous, and would infringe state sovereignty.

Regardless of the outcome of this case, courts applying state statutes that differ from the NLRA should remain free to balance the equities in different ways, as they have in the past. As long as federal immigration law does not prohibit awards of back pay to undocumented workers who are unlawfully discharged — which, as demonstrated by the United States and various amici, it does not — the states, in the exercise of their police and sovereign powers, must remain free to strike their own policy balance.

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2. *See, e.g.*, Petitioner's Brief at 7 (*Sure-Tan* held undocumented workers may not "recover backpay as compensation for an unlawful discharge"), 8 (*Sure-Tan* "recognized that the discharged employees would very likely be left without any remedy whatsoever"), 10 (undocumented aliens are "not entitled to backpay"), 20 ("Immigration Laws Prohibit an Award of Backpay"), and 28 (undocumented workers are "not eligible for an award of backpay").

SUMMARY OF ARGUMENT

If federal and state laws protecting labor standards and prohibiting employment discrimination are to be effective, the tribunals that enforce them must have the power to consider back pay awards to undocumented workers. Despite IRCA, numerous undocumented employees work in the amici states. Their presence is especially significant in particular areas and occupations. In many industries, state employment statutes would be rendered meaningless if no back pay remedy for violations were available to undocumented workers. Enforcement of these laws depends on cooperation from employees, which is difficult enough to obtain from workers subject to deportation. If undocumented workers were foreclosed from monetary remedies it would be impossible to obtain their assistance in law enforcement investigations, and state laws that protect both documented and undocumented employees could not be enforced.

State law routinely grants undocumented workers a back pay remedy in a variety of contexts. In many state tort and contract cases, for example, undocumented aliens have been permitted to sue their employers and their lost wages have been treated as damages, even though the aliens could not lawfully have earned the same money as wages. Similarly, most state workers' compensation cases have found that undocumented employees are entitled to workers' compensation benefits, even though not lawfully employed. Cases applying state and federal labor standards and equal employment law have likewise awarded back pay to undocumented aliens who have suffered harm under the applicable statutes. And states with labor laws that protect workers not covered by the NLRA apply those laws to award back pay to undocumented workers who have been fired illegally.

The rationale for awarding back pay to undocumented workers set forth in these state law cases applies equally to the

present case. Like state statutes supporting back pay awards, the NLRA does not distinguish documented from undocumented employees. State courts have likewise recognized that providing undocumented workers a back pay award gives wronged individuals the only possible remedy, while also protecting law-abiding employers from unfair competition. Moreover, as decisions applying state laws recognize, prohibiting back pay remedies for undocumented workers would undermine immigration policy by encouraging employers to hire undocumented aliens, and would also undermine labor policy by leaving employers' legal violations unpunished.

Regardless of the outcome of this case, this Court should clarify that federal law does not preempt state law awarding back pay to undocumented workers. States are free to regulate these employees unless such regulation clearly conflicts with federal law. Neither immigration law nor any other federal law creates such a conflict.

ARGUMENT

I. The availability of back pay for undocumented employees is crucial to the effectiveness of state law.

As their States' chief law enforcement officers, amici support the availability of back pay for undocumented employees. Approximately five million undocumented aliens reside in the United States.[3] Amici do not condone the presentation of false documents or other violations of immigration law. Such misconduct certainly subjects those aliens to deportation and criminal prosecution, but it should not result in denial of redress for acts whose wrongfulness was unrelated to an employee's status. Nor should it give employers a free pass for unrelated wrongdoing. To do so is unfair not only to

3. *See supra* at n.1.

the aliens, but also to other employees, whose collective legal protection is undercut, and to employers that obey the law.[4]

Furthermore, enforcement of employment law, including minimum wage, occupational safety and many other laws, depends on cooperation from employees. Such cooperation is difficult enough to obtain from workers who fear deportation that will proceed, if warranted by immigration law, regardless of an employer's misconduct. Breach of laws that protect undocumented employees would never be reported if these workers were also foreclosed from statutory remedies. In many industries the effect would be the curtailment or effective elimination of minimum wage, safety and other important laws. The states' ability to enforce their employment laws — which necessitates the availability of a back pay remedy — should not be thwarted simply because of an employee's undocumented status. *Cf. Montero v. INS*, 124 F.3d 381, 384-85 (2d Cir. 1997) (enforcement of immigration law should not be impeded by labor law violation of an employer that illegally called in the INS).

Initiatives to enforce employment laws undertaken by various amici states demonstrate the critical importance of back pay remedies. For example, a recent investigation of New York City's greengroceries revealed that workers, mostly immigrants from Mexico, were paid as little as $2.61 an hour for work weeks as long as 84 hours, when federal and state minimum wage laws require $5.15 per hour and time-and-a-half for work over 40 hours. Many workers are believed to be undocumented, and securing their cooperation during the investigation would have been impossible if they were ineligible for monetary remedies. State-court lawsuits filed by the New York Attorney General to

4. That hiring undocumented workers in order to pay less than the prevailing wage can directly harm competing employers was ently recognized in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, __ F.3d __, 2001 U.S. App. LEXIS 25170 at *17-*19 (2d Cir., Nov. 15, 2001).

enforce minimum wage laws resulted in the recovery of over $600,000 for underpaid workers. Without a back pay remedy, New York's greengroceries would effectively be placed outside the reach of the minimum wage laws.

California, which has the largest number of undocumented residents among the fifty states, has similarly found the availability of back pay remedies essential to effective enforcement of state labor laws. The California Agricultural Labor Relations Board (ALRB) enforces the Agricultural Labor Relations Act (ALRA), which affords farm workers rights analogous to those provided to other workers by the NLRA. Cal. Lab. Code §§ 1140-1166 (Deering 2001); *see also Fresh International Corp. v. ALRB*, 805 F.2d 1353, 1358-60 (9th Cir. 1986) (describing enforcement of ALRA as important state interest). California has the largest agricultural workforce in the United States, including an estimated 900,000 individuals each year. *See* Philip L. Martin, *Promises to Keep: Collective Bargaining in California Agriculture* (1996) at 20, 40. According to the United States Department of Labor, approximately 52 percent of farm workers in the United States in 1997-1998 were undocumented,[5] and the ALRB believes that the proportion of undocumented farm workers in California likely exceeds this level. Remedies available under the ALRA for unfair labor practices are generally restricted to cease-and-desist orders, back pay, and reinstatement. In light of the substantial proportion of undocumented workers in California's agricultural sector, the inability to award back pay would deprive the ALRB of any meaningful remedies with which to enforce the law, and render the ALRA a virtual nullity.

In Massachusetts, the Attorney General's Office has investigated a significant number of wage violations involving

5. U.S. Dep't of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of United States Farmworkers* (March 2000), http://www.dol.gov/asp/programs/agworker/report_8.pdf, at 22.

immigrants in the asbestos remediation industry, illustrating the importance of employee cooperation and a back pay remedy to enforcement of safety and environmental laws. Advanced Building Systems, Inc., an asbestos removal firm, was charged with failure to pay overtime to 97 immigrant employees, many of whom were most likely undocumented. The company had failed to list the immigrant workers on its payroll records. Because of the missing or false information about the identities of many immigrant employees, it appears that many had never been legally licensed to handle asbestos. The Massachusetts Attorney General is currently involved in numerous cases against other asbestos removal contractors that failed to pay immigrant employees properly.

II. State law grants undocumented workers a back pay remedy in a variety of contexts, for reasons that support an affirmance of the decision below.

In dealing with the back pay claims of undocumented workers, the states have usually followed an approach similar to that applied under the NLRA in *Sure-Tan*, which held that "[c]ounterintuitive though it may be," there was no conflict between the mandate of immigration law and legal protection for such workers under the NLRA. 467 U.S. at 891. These cases arise in a variety of contexts, and reflect considerations that should likewise lead this court to affirm the decision below.

A. Courts applying state law in a variety of contexts have permitted back pay awards to undocumented workers.

Decisions in several different areas of state law support the availability of back pay awards to undocumented employees.

State tort and contract cases. In many state tort and contract cases brought by undocumented aliens, lost wages have been treated as damages. While some, but not all, of these cases

antedate *Sure-Tan*, their reasoning remains relevant to the question before the Court. State courts have rejected claims that general language governing lawsuits excludes undocumented workers for much the same reasons *Sure-Tan* refused to exclude them from the term "employee."[6] These state decisions include, for example, a decision by the Alaska Supreme Court allowing an undocumented worker's contract suit for unpaid wages, *see Gates v. Rivers Constr. Co.*, 515 P.2d 1020 (Alaska 1973), and decisions from New Jersey, New York, and Virginia courts holding that undocumented workers or their heirs could be awarded wages lost because of accidents or injuries. *See Montoya*, 401 A.2d at 1104-06; *Public Administrator of Bronx County v. Equitable Life Assurance Society*, 595 N.Y.S.2d 478 (N.Y. App. Div. 1993); *Peterson v. Neme*, 281 S.E.2d 869, 872 (Va. 1981). State courts have thus allowed undocumented aliens to receive as damages money they could not lawfully have earned as wages.

The reasons given by state courts in support of these determinations to award damages for lost wages fall into three categories: statutory language, fairness, and the goals of immigration policy. For example, in permitting an undocumented worker to sue for promised wages even though most illegal contracts are unenforceable, the Alaska Supreme Court pointed to each of these rationales:

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6. *E.g.*, *Montoya v. Gateway Insurance Co.*, 401 A.2d 1102, 1105-06 (N.J. Super. Ct. 1979) (illegal employee an "income producer" and "in an occupational status" within the meaning of insurance policy); *Maldonado v. Allstate Insurance Co.*, 789 So. 2d 464, 468-70 (Fla. Dist. Ct. App. 2001) (illegal alien a "resident" within the meaning of no-fault insurance statute); *Torres v. Sierra*, 553 P.2d 721, 724 (N.M. Ct. App. 1976) (illegal alien a "person" within the meaning of Wrongful Death Act); *Catalanotto v. Palazzolo*, 259 N.Y.S.2d 473, 475-77 (N.Y. Sup. Ct. 1965) (illegal alien a "qualified person" within the meaning of uninsured motorist statute).

> First, . . . the statute itself does not specifically declare the labor or service contracts of aliens . . . to be void. . . . Second, . . . a harsh and undesirable consequence . . . should be countenanced only when clearly demonstrated to have been intended by the legislature. Third, . . . the safeguarding of American labor . . . would not be furthered by permitting employers . . . to refuse to pay [undocumented workers]. . . . [T]o so hold could well have the opposite effect. . . .

Gates, 515 P.2d at 1021-02. Other courts have focused specifically on the fact that the availability of back pay damages does not impede immigration policy. The Virginia Supreme Court explained that "a person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses." *Peterson*, 281 S.E.2d at 872. A New Jersey court stressed the same point: While no one "illegally enters this country for the purpose of initiating litigation," denying remedies could increase illegal entries as employers exploit "the alien's inability to lodge claims against them for wages or on account of injuries sustained." *Montoya*, 401 A.2d at 1104; *see also Arteaga v. Literski*, 265 N.W.2d 148, 150 (Wis. 1978) ("It cannot be seriously argued that people enter this country illegally so they can recover for an injury").

State workers' compensation cases. As with state tort and contract suits, most state workers' compensation cases have held that undocumented employees can receive monetary relief. This is so even though entitlement to lost wages in workers' compensation claims arises from a state statute specifically governing "workers" or "employees," a category into which undocumented employees would not have fallen if they had obeyed the law.

The prevailing rule in state courts is that "the distinction between alien and citizen is of no relevance to compensation

law." 5-97 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 97.07 (2001). Moreover, courts expressly considering the question have concluded that IRCA does not preempt the application of state workers' compensation law to undocumented workers.[7] Accordingly, workers' compensation benefits are available to illegal employees in most states.[8] Indeed, when Virginia's Supreme Court found undocumented employees excluded from workers' compensation, the legislature amended the law to cover "aliens and minors, . . . whether lawfully or unlawfully employed." *See Rios v. Ryan, Inc.*, 542 S.E.2d 790, 792 n.2 and 794 (Annunziata, J., concurring) (Va. Ct. App. 2001) (finding amendment not retroactive).

As with cases providing for the award of lost wages in tort and contract claims, state courts refer to statutory language, fairness, and immigration policy in explaining why lost wages

7. *See Dowling v. Slotnik*, 712 A.2d 396, 402-05 (Conn. 1998); *Reinforced Earth Co. v. Workers' Compensation Appeal Board*, 749 A.2d 1036, 1038 (Pa. Commw. Ct. 2000). *Cf. Iowa Erosion Control, Inc. v. Sanchez*, 599 N.W.2d 711, 715 (Iowa 1999) (IRCA's purpose "was not to preempt state laws benefitting undocumented aliens"). Colorado and Nevada courts likewise concluded that IRCA does not bar payment of benefits to undocumented employees. *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671, 673 (Colo. Ct. App. 1997); *Tarango v. State Indus. Ins. System*, 25 P.3d 175, 178-79 (Nev. 2001).

8. *See, e.g., Del Taco v. Workers' Compensation Appeal Board*, 94 Cal. Rptr. 2d 825, 828 (Cal. Ct. App. 2000); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138, 1139 (La. Ct. App. 1996); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 224 (N.J. Super. Ct. App. Div. 1996); *Testa v. Sorrento Restaurant, Inc.*, 197 N.Y.S.2d 560, 562 (N.Y. App. Div. 1960); *Lang v. Landeros*, 918 P.2d 404, 406 (Okla. Ct. App. 1996); *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635, 636-37 (Tex. Civ. App. 1972). *But see Felix v. State ex rel. Safety & Compensation Division*, 986 P.2d 161, 163-64 (Wyo. 1999) (Wyoming workers' compensation statute excludes undocumented employees); *Cenvill Development Corp. v. Candelo*, 478 So. 2d 1168, 1170 (Fla. Ct. App. 1985) (employer estopped from denying coverage "only where he knew or should have known of the true status of the employee").

are likewise available in workers' compensation actions. The text of state laws supports such an award because among states whose courts have considered the issue, only in Wyoming does statutory language differentiate undocumented from other employees. *See Rios*, 542 S.E.2d at 794 n.3 (Annunziata, J., concurring) ("All but one of the several jurisdictions . . . that have considered the question have held that a claimant's illegal alien status does not affect or preclude workers' compensation benefit awards.") As for fairness considerations, workers' compensation replaces tort claims, whose viability, as discussed above, would not be affected by a victim's illegal status. *See Mendoza*, 672 A.2d at 225 (no basis to deny "the substitutionary remedy").[9] Finally, courts have generally agreed that excluding the undocumented from statutory remedies is more likely to increase than to discourage illegal immigration, while also creating other undesirable incentives. While benefits in case of injury "realistically cannot be described as an incentive for undocumented aliens to enter this country illegally," denying coverage would create "a financial incentive for unscrupulous employers" to recruit them. *Dowling*, 712 A.2d at 404. *See also Mendoza*, 672 A.2d at 225 (denying coverage would "provide a disincentive to assuring workplace safety" and "have the further undesirable effect of encouraging employers to hire illegal aliens"); *Reinforced Earth*, 749 A.2d at 1039-40 (employers might "seek out illegal aliens . . . because they will not be forced to insure against or absorb the costs of work-related injuries").

Labor standards and equal employment law. A back pay remedy is also available under many state labor standards and equal employment laws. In part because most state labor standards investigations are settled at the administrative level based on the availability of remedies that include back pay,

9. States have similarly recognized that undocumented and underage employees resemble each other in being legally barred from work yet vulnerable, if they work anyway, to unrelated injuries for which a remedy should be awarded. *See, e.g., Testa*, 197 N.Y.S.2d at 562; *Rios*, 542 S.E.2d at 792 n.2.

there are few reported decisions applying state labor standards and equal opportunity statutes, but most states have laws in these areas that are similar to their federal counterparts. Undocumented aliens have been awarded back pay under the federal Fair Labor Standards Act, after as well as before *Sure-Tan* and IRCA.[10] The same is true under state minimum wage laws. *See, e.g., Nizamuddowlah v. Bengal Cabaret, Inc.*, 415 N.Y.S.2d 685 (N.Y. App. Div. 1979). Equal opportunity law has also been invoked by undocumented employees,[11] who are especially vulnerable to sexual harassment. Back pay is a significant potential remedy, because harassment often ends in the victim's direct or constructive discharge.[12]

States with labor laws that protect workers not covered by the NLRA likewise extend those laws to undocumented workers. Although the NLRA preempts state labor law, a number of states have labor statutes similar to the NLRA that protect workers not within the NLRA's scope, most notably agricultural workers. State tribunals have found illegally fired undocumented workers entitled to back pay under these statutes. *See Arizona*

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10. *See, e.g., Patel v. Quality Inn South*, 846 F.2d 700, 704-06 (11th Cir. 1988); *Contreras v. Corinthian Vigor Ins. Brokerage*, 25 F. Supp. 2d 1053, 1056-58 (N.D. Cal. 1998); *Alvarez v. Sanchez*, 482 N.Y.S.2d 184 (N.Y. App. Div. 1984).

11. *See, e.g., Rios v. Steamfitters Local 638*, 860 F.2d 1168, 1171-73 (2d Cir. 1988); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585, 587-94 (E.D. Cal. 1991). The EEOC's "Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws," N-915.040 (Oct. 26, 1999), at nn.32-35 and accompanying text, takes an approach like the NLRB's, barring a reinstatement order for a discriminatee known to be forbidden to work, but not back pay.

12. *See, e.g., EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1507-09 (9th Cir. 1989); *Murillo v. Rite Stuff Foods, Inc.*, 77 Cal. Rptr. 2d 12, 15 (Cal. Ct. App. 1998); *Urrea v. New England Tea & Coffee Co.*, 2000 Mass. Super. Ct. LEXIS 690 (Mass. Super., Sept. 1, 2000) at *2.

Farmworkers Union v. Phoenix Vegetable Distributors, 747 P.2d 574, 578 (Ariz. Ct. App. 1986) (enforcing Arizona Agricultural Employment Relations Board determination); *Phillip D. Bertelsen, Inc. v. ALRB*, 29 Cal. Rptr. 2d 204, 209 (Cal. Ct. App. 1994) (enforcing ALRB determination); *Rigi Agricultural Services, Inc.*, 11 ALRB No. 27 (1985); *La Crepe-Number 3 Ltd.*, 36 SLRB 52, 53 (1973) (New York State Labor Relations Board decision). While these cases involved pre-IRCA conduct, IRCA, as discussed in Point III, does not supersede the holdings. It forbids hiring workers the employer knows to be undocumented, not paying wages or back pay for a period when the employer did not know the worker's immigration status.

B. The decision below should be upheld for reasons reflected in the state-law decisions.

Amici states adopt the arguments of the United States Solicitor General that the decision below should be affirmed. Moreover, respondent's argument that the NLRA permits undocumented employees to receive back pay but not reinstatement to work from which they are foreclosed by federal law is well within the mainstream of interpretation of other employment statutes and state common law.

The reasoning relied on by state courts to uphold back pay remedies for undocumented workers — regarding statutory language, fairness, and immigration policy — is relevant to the construction of the NLRA. First, the text of the NLRA and relevant immigration statutes does not foreclose the award of back pay. Like state statutes such as the agricultural labor law applied in *Bertelsen*, 29 Cal. Rptr. 2d at 204, the NLRA does not distinguish documented from undocumented employees. Congress, though well aware that there are many undocumented workers, has never changed that. As the D.C. Circuit held in the present case, "IRCA neither amends nor repeals the NLRA or any other labor law," 237 F.3d at 646, and the same is true of later amendments to immigration law discussed in Point III below.

Second, state courts recognize that fairness weighs strongly in favor of authorizing back pay remedies for workers if they are wronged, regardless of their immigration status, *see, e.g.*, *Gates*, 515 P.2d at 1021-22, just as in other contexts undocumented aliens are not wholly "beyond the protection of the law." *Janusis v. Long*, 188 N.E. 228, 230-32 (Mass. 1933) (alien's illegal presence no defense to tort suit). *Cf.* Petitioner's Br. at 8 (undocumented workers should "be left without any remedy whatsoever"). Eliminating an otherwise-available reinstatement remedy for a worker who has presented fraudulent documents to obtain employment — to say nothing of the prospect of deportation and criminal prosecution — sufficiently penalizes such misconduct. Elimination of back pay would serve only to undermine a statute that protects all employees, documented and undocumented, as well as protecting law-abiding employers from unfair competition.

Third, this Court's reconciliation of the NLRA and IRCA should be informed by the state courts' insight that back pay "realistically cannot be described as an incentive for undocumented aliens to enter this country illegally." *Dowling*, 212 A.2d at 404. "[A] person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses." *Peterson*, 281 S.E.2d at 872. Nor can it "be seriously argued that people enter this country illegally so they can recover for an injury that will be inflicted upon them later." *Arteaga*, 265 N.W.2d at 150; *see also Montoya*, 401 A.2d at 1104 (no one "illegally enters this country for the purpose of initiating litigation").

The remedy upheld by the D.C. Circuit will not undermine immigration policy by increasing the employment of undocumented workers. Striking it down, however, will encourage employers to hire undocumented aliens who cannot "lodge claims against them for wages or on account of injuries sustained," *Montoya*, 401 A.2d at 1104, and "to enter into the very type of contracts sought to be prevented," *Gates*, 515 P.2d

at 1022. That labor policy would also be undermined by such a ruling is self-evident. Even with respect to employers not seeking to punish pro-union workers, a rule barring back pay would, as this Court explained in reference to the Age Discrimination in Employment Act, undermine the "objective of forcing employers to consider and examine their motivations" before acting. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995).

Reversal of the D.C. Circuit would thus undermine two important policies, reflected in both labor law and immigration law, just as making the undocumented ineligible for workers' compensation would "provide a disincentive to assuring workplace safety" and "have the further undesirable effect of encouraging employers to hire illegal aliens." *Mendoza*, 672 A.2d at 225. For these reasons, as well as those set forth by the United States Solicitor General, the D.C. Circuit should be affirmed.

III. Federal law does not preempt state law awarding back pay to undocumented workers.

To preserve the wide array of state workplace enforcement mechanisms that rely on back pay awards, this Court should clarify that federal law does not preempt state statutes permitting undocumented workers to recover back pay. As recognized in *De Canas v. Bica*, 424 U.S. 351 (1976), states are free to regulate even undocumented employees unless there is a clear conflict with federal law. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* at 355. Rather, state power to regulate employment extends to undocumented workers unless there is a "specific indication . . . that Congress intended" otherwise. *Id.* at 358. Federal immigration law provides no such indication.

In the absence of a Congressional mandate barring a particular remedy for undocumented workers, states are free to

extend them the same remedies available to other employees when the states deem it rational to do so. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States"). Most states deem undocumented workers to be "the same" as other employees in various legal contexts. A state can limit the remedies of undocumented workers; a few states have, as discussed above. But federal immigration law does not mandate such limitations, and this Court should not thwart the intention of the states that permit back pay awards by imposing a broad rule that would, as Justice Kennedy once put it, "leave helpless the very persons who most need protection from exploitative employer practices." *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring). Their exclusion from back pay remedies, if it is to happen, must be enacted by Congress or effected by individual states.

Petitioner's brief wrongly implies that *Sure-Tan* or IRCA bars all back pay awards to undocumented aliens, *see supra* at n.2, but immigration law plainly does not do so. IRCA forbids an employer to hire someone it knows to be undocumented, but nowhere does it prohibit the payment of back wages for a period when the employer did not know the worker's immigration status. As the court below noted, "nothing in IRCA directly bars such an award . . . . IRCA neither amends nor repeals the NLRA or any other labor law." 237 F.3d at 646 (relying upon legislative history indicating that IRCA does not limit the discretion of federal or state agencies). By contrast, IRCA provisions that govern employer petitions to admit workers to the United States and sanctions on those that hire undocumented workers do expressly preempt state regulation. *See* 8 U.S.C. §§ 1188(h)(2) and 1324a(h)(2). IRCA should not be read "as preempting anything but the laws specifically mentioned." *Luo Yu Jie v. Liang Tai Knitwear Co.*, 107 Cal. Rptr. 2d 682, 690 (Cal. Ct. App. 2001).

Three post-IRCA changes to immigration law have only strengthened this conclusion by toughening sanctions on illegal immigration without barring back pay for undocumented workers. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (the "Welfare Reform Act"). Moreover, it is clear that when Congress wanted to restrict protections available to certain classes of aliens, it knew how to do so. For example, the Welfare Reform Act makes most aliens ineligible for "public benefits," as expansively but specifically defined by the statute, except "through the enactment of a State law after August 22, 1996 which affirmatively provides for such eligibility." 8 U.S.C. §§ 1611(a) and (c) and 1621(a), (c) and (d). No analogous statutory provision bars or even restricts undocumented aliens' eligibility for back pay awards.

Nor does the reasoning of *Sure-Tan* preclude an award of back pay under state statutes. *Sure-Tan* was rooted in the rule that NLRA back pay orders must "expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." 467 U.S. at 900. State law, however, often allows awards beyond actual damages. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case"); *Cush-Crawford v. Adchem Corp.*, __ F.3d __ 2001, U.S. App. LEXIS 24806 at *13-*16 (2d Cir., Nov. 16, 2001) ("no one common law rule"). The significant point is that state law need not, and in some cases clearly does not, limit damages as strictly as the NLRA.

Judge Sentelle, dissenting in this case, argued that "the logic of" IRCA cuts against awarding back pay that a worker "could not lawfully earn." 237 F.3d. at 651. Such "logic," even if it had persuasive force, is not a statutory ban that preempts state law

remedies, but a factor to be considered when enforcing actual statutes: by the Board, for the NLRA; by state courts, for state statutes. While this Court can properly correct the Board if it wrongly balances competing public policies under federal law, the states' balancing of competing policies should not be overridden even if it differs from the federal balance unless federal law so requires, as it does not. Even if this Court were to reverse under the NLRA, it should not prevent states, under their own laws, from granting back pay or other appropriate remedies to undocumented workers.

CONCLUSION

For the foregoing reasons, as well as those stated by the United States Solicitor General and other amici curiae, the judgment of the court below should be affirmed.

Respectfully submitted,

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